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(4)

NO. 06-413

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

Robert M. McKenna
Attorney General

William Berggren Collins
Jay D. Geck
Deputy Solicitors General

Paul D. Weisser
Senior Counsel

John J. Samson*
Assistant Attorney General
**Counsel of Record*

PO Box 40116
Olympia, WA 98504-0116
360-586-1445

Counsel For Petitioners

FORMER CAPITAL CASE

QUESTION PRESENTED

In *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986), this Court held that a state trial judge may, without setting forth any explicit findings or conclusions, remove a juror for cause when the judge determines the juror's views on the death penalty would substantially impair his or her ability to follow the law and perform the duties of a juror. The Court further held that a federal habeas court reviewing the decision to remove the juror must defer to the trial judge's ability to observe the juror's demeanor and credibility, and apply the statutory presumption of correctness to the judge's implicit factual determination of the juror's substantial impairment.

Did the Ninth Circuit err by not deferring to the trial judge's observations and by not applying the statutory presumption of correctness in ruling that the state court decision to remove a juror was contrary to clearly established federal law?

PARTIES

The petitioner is Jeffrey A. Uttecht, the Superintendent of the Washington State Penitentiary. Mr. Uttecht is the successor in office to John Lambert, who was the respondent-appellee in the Ninth Circuit.

The respondent is Cal Coburn Brown.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006) (Pet. App. 1a–41a). The order of the United States District Court for the Western District of Washington is unpublished. Pet. App. 43a–91a. The Washington Supreme Court's opinion affirming Brown's conviction and sentence on direct appeal is reported at *State v. Brown*, 132 Wash. 2d 529, 940 P.2d 546 (1997) (Pet. App. 92a–221a).

JURISDICTION

The court of appeals first entered its opinion on December 8, 2005. Pet. App. 1a. The court entered an amended opinion, and denied a timely petition for rehearing en banc, on June 19, 2006. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The sixth amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

28 U.S.C. § 2254(d) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court

shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

28 U.S.C. § 2254(e)(1) provides:

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

STATEMENT

Respondent Brown was convicted of aggravated first degree murder by a jury and sentenced to death. During jury selection, the trial court dismissed a juror because his answers during voir dire persuaded the judge that the juror's views about the death penalty would prevent or substantially impair the juror from faithfully and

impartially applying the law. The Ninth Circuit Court of Appeals ruled that the trial court erred in removing the juror and granted Brown's petition for a writ of habeas corpus, vacating his death sentence.

1. The Murder Of Holly Washa

In 1991, Brown abducted Holly Washa at knife point as she was driving out of the parking lot of her workplace. Pet. App. 97a. After stealing her money, Brown handcuffed her and took her back to his room at a local area motel. Pet. App. 97a–98a. Over the course of two days, Brown repeatedly raped and tortured Washa while she was bound and gagged in the motel room. Pet. App. 98a–99a. Brown whipped her, penetrated her vaginally and anally with an aftershave lotion bottle, held a hot hair dryer close to her vagina, breasts, and stomach, and shocked her by using an electric extension cord with the end cut off. Pet. App. 98a–99a. Brown later described these acts as torture. Pet. App. 99a–100a.

Brown finally left the motel for the airport to fly to California. Pet. App. 100a. Brown handcuffed Washa and forced her into the trunk of his car. He drove to the airport where he cut her throat and stabbed her in the chest to avoid leaving a witness to his crimes. Pet. App. 100a. Brown left Washa's body in the trunk of the car. Brown was arrested a few days later in California in the midst of raping, torturing, and attempting to kill another woman. Brown confessed in detail to the murder of Washa.

2. Application Of The Death Penalty In Washington

Brown was charged with the aggravated first degree murder of Holly Washa, and the prosecution filed a notice of intent to seek the death penalty. Pet. App. 104a–05a. Washington law defines aggravated first degree murder as premeditated first degree murder with one or more statutory aggravating factors. Wash. Rev. Code § 10.95.020 (J.A. 163–65). The aggravating factors in this case were that Brown committed the murder to conceal the commissions of his crimes or identity, and that he committed the murder in the course of or in furtherance of the crimes of rape, robbery, and kidnapping.

Washington law provides only two possible sentences for a conviction of aggravated first degree murder—death, or life imprisonment without parole. Wash. Rev. Code § 10.95.030 (J.A. 166–67). When the prosecution files notice of intent to seek the death penalty, the trial is bifurcated. *State v. Kincaid*, 103 Wash. 2d 304, 310, 692 P.2d 823 (1985). In the guilt phase, the jury determines whether the defendant is guilty of premeditated first degree murder and whether one or more of the statutory aggravating circumstances exist. *Id.* In the penalty phase, the jury determines whether there are not sufficient mitigating circumstances to merit leniency. *Id.*; Wash. Rev. Code § 10.95.060 (J.A. 168–69). The penalty phase jury deliberates upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not

sufficient mitigating circumstances to merit leniency?" Wash. Rev. Code § 10.95.060(4) (J.A. 169).

The verdict must be unanimous in order to answer the question in the affirmative. Wash. Rev. Code § 10.95.060(4) (J.A. 169). If the jury answers in the affirmative, the defendant is sentenced to death. Wash. Rev. Code § 10.95.080(1) (J.A. 170); Wash. Rev. Code § 10.95.030(2) (J.A. 166–67). If the jury answers the question in the negative, or if the jury is unable to unanimously agree on the answer, the defendant shall be sentenced to life imprisonment without parole. Wash. Rev. Code § 10.95.080(2) (J.A. 170); *see also* J.A. 154. Thus, if one juror is unable or unwilling to vote for a death sentence, the sentence will be life imprisonment without parole.

3. The Selection Of Brown's Jury

Judge Ricardo S. Martinez presided over the trial. Pet. App. 105a. Jury selection took seventeen judicial days. J.A. 123–44. Since it was a capital case, the questionnaires filled out by the prospective jurors included questions regarding their views on the death penalty, and counsel for the prosecution and defense were allowed to ask about the death penalty during voir dire. Pet. App. 160a.

a. The Standard For An Impartial Jury In A Capital Case

An impartial jury is composed of "jurors who will conscientiously apply the law and find the facts." *Wainwright v. Witt*, 469 U.S. 412, 423 (1985). "Jurors . . . take an oath to follow the law as charged, and they are expected to follow it." *United States v. Powell*, 469 U.S. 57, 66 (1984). For this reason,

"trials generally begin with voir dire, by judge or counsel, seeking to identify those jurors who for whatever reason may be unwilling or unable to follow the law and render an impartial verdict on the facts and the evidence." *Powell*, 469 U.S. at 66–67.

In a capital case, a juror's views about the death penalty may prevent the juror from being impartial and following the law. Thus, the state may exclude jurors opposed to capital punishment because "those jurors might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Witt*, 469 U.S. at 423. Accordingly, the judge must exclude a prospective juror where "the juror's views [regarding the death penalty] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). On the other hand, "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Such a juror must also be dismissed.

Whether a juror is substantially impaired is an issue of fact. *Witt*, 469 U.S. at 429. The judge need not determine by unmistakable clarity that the juror would automatically vote for or against the death penalty. *Id.* at 424. Rather, the standard requires only a showing that the juror is substantially impaired. *Id.* The trial judge's determination that a particular juror is substantially impaired is entitled to deference, because the

"finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Witt*, 469 U.S. at 428.

b. The Prosecution's Challenge Of Mr. Deal

During voir dire, there was a dispute about the proper standard for disqualifying jurors based on their views regarding the death penalty. Defense counsel argued that the trial court should apply the standard from *Witherspoon v. Illinois*, 391 U.S. 510 (1968), which required the court to determine whether the prospective juror would automatically vote against the death penalty. J.A. 7–8. The prosecution argued the court should apply the "substantial impairment" standard from *Witt*. J.A. 8. Judge Martinez informed counsel that, in reviewing any challenge for cause, he would apply the "substantial impairment" standard set forth in *Witt*. J.A. 8–9. Judge Martinez also explained to counsel that they should indicate if they agreed on a particular challenge but, if they did not, he would allow further inquiry to resolve the dispute. J.A. 26–27.

The prosecution challenged twelve jurors for cause based upon their views on the death penalty. J.A. 127–40.[1] Defense counsel objected to seven of those twelve challenges. Judge Martinez sustained defense counsel's objection as to five of the jurors and overruled the objection as to the other two. *See* J.A. 127–40. Where the defense objected, Judge Martinez

[1] The parties also exercised peremptory challenges. The prosecution had two unused peremptory challenges at the conclusion of jury selection. J.A. 122.

expressed for the record his determination as to whether the juror was substantially impaired. *See, e.g.*, J.A. 37–39, 54–56, 97–100, 117–21. The prosecution challenged one juror because he would automatically vote for the death penalty, and Judge Martinez dismissed that juror. J.A. 133 (Juror Reynoso). Defense counsel did not object to the removal of the other five jurors challenged by the prosecution, including Richard Deal.

In his questionnaire, Mr. Deal stated that he was "in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again." J.A. 69. When asked by defense counsel about his general feelings about the death penalty, Mr. Deal stated: "I do believe in the death penalty in severe situations." J.A. 58. Mr. Deal said that an example of a severe situation was "the young man . . . that killed a couple of boys down in the Vancouver area and was sentenced to the death penalty, and wanted the death penalty."[2] J.A. 58–59. Defense counsel asked whether the fact that the defendant wanted to die had "any kind of bearing on your idea that the death penalty was appropriate in his case?" J.A. 59. Mr. Deal responded: "I believe that it was in that case." J.A. 59. Mr. Deal was asked about the imposition of the death penalty in the situation where the defendant did not want to die. Mr. Deal responded:

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[2] Mr. Deal was referring to Wesley Allan Dodd, a serial molester and killer of children, who pled guilty to aggravated murder and who waived all challenges to his sentence of death. *State v. Dodd*, 120 Wash. 2d 1, 838 P.2d 86 (1992).

> "It would have to be a severe case. I guess I can't put a real line where that might be, but there are a lot of cases that I don't think it's where people would—" J.A. 59.

Mr. Deal was not aware that in Washington there were only two penalties for aggravated first degree murder—life in prison without the possibility of parole and the death penalty. J.A. 61. Mr. Deal learned of this fact on the day of his voir dire. J.A. 71. After asking Mr. Deal several questions about life imprisonment without parole (J.A. 60–62), defense counsel asked whether Mr. Deal "could consider both options?" J.A. 62. Mr. Deal responded: "Yes, I could." J.A. 62. However, immediately after this response he was asked "why you think the death penalty is appropriate, what purpose it serves[?]" J.A. 62. Mr. Deal responded:

> "I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." J.A. 62.

Defense counsel once again asked if Mr. Deal could consider both possible sentences, and he responded: "I believe so, yes." J.A. 62. Defense counsel then referred to Mr. Deal's questionnaire where he stated that the death penalty should be imposed "if somebody had been killed and it had been proven to you that they would kill again" (J.A. 62) and asked if Mr. Deal would be "frustrated" if he did not hear evidence in the penalty phase about whether Brown would kill again. J.A. 63. Mr. Deal responded: "I'm not sure." J.A. 63.

Referring to Mr. Deal's questionnaire, the prosecutor asked whether Mr. Deal "would . . . still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us[.]" J.A. 69–70. Mr. Deal responded:

> "A I would have to know the, I'm at a loss for the words here.
>
> "Q You can ask me any questions, too, if you need some clarification.
>
> "A I guess it would have to be in my mind very obvious that the person would reoffend." J.A. 70.

The prosecutor asked Mr. Deal if he would "find it difficult to vote for the death penalty given a situation where he couldn't kill again?" J.A. 71. Mr. Deal responded: "I think I made that statement [in my questionnaire] more under [sic] assumption that a person could be paroled." J.A. 71.

The prosecutor asked Mr. Deal whether he would be willing to vote for the death penalty in light of the fact that the alternative sentence would be life without the possibility of parole. J.A. 71–72. Mr. Deal said:

> "I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole." J.A. 72.

The prosecutor asked again if the "idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?" J.A. 72. Mr. Deal responded:

> "I do feel that way if parole is an option, without parole as an option. I believe in the death penalty. Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure." J.A. 72–73.

The prosecutor tried once again and asked Mr. Deal, in the situation where there is no parole, if he could consider the death penalty. J.A. 73. Mr. Deal said: "I could consider it, yes." J.A. 73. When asked if he could impose it, Mr. Deal said: "I could if I was convinced that was the appropriate measure." J.A. 73.

The prosecutor challenged Mr. Deal for cause, arguing Mr. Deal's statements showed he could impose the death penalty only if the defendant had killed and would be in a position to kill again. J.A. 75. The prosecutor argued Mr. Deal had not said anything to overcome his idea that a defendant must be able to kill again. J.A. 75. In response to the prosecutor's challenge, defense counsel said: "We have no objection." J.A. 75. Judge Martinez excused Mr. Deal. J.A. 75. Although Brown sought reconsideration of the decision to remove another juror (J.A. 101–14), Brown did not seek reconsideration of the decision to excuse Mr. Deal. Brown was subsequently convicted of aggravated first degree murder and sentenced to death.

4. The State Supreme Court's Opinion

On direct review, the Washington Supreme Court affirmed Judge Martinez's decision to remove Mr. Deal. Pet. App. 173a. The court began by explaining that "[t]he standard for ruling on

challenges for cause in a death penalty case is whether the prospective juror's views would prevent or substantially impair the performance of that person's duties as a juror according to instructions and the oath taken by jurors." Pet. App. 171a (citing *Witt*, 469 U.S. at 424). The court also stated that it must give "deference to the trial court's finding that a prospective juror's views on the death penalty will prevent that person from trying the case fairly and impartially." Pet. App. 171a. This is because the "trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial." Pet. App. 171a. Quoting this Court, the Washington Supreme Court recognized "the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. . . ." Pet. App. 171a (quoting *Witt*, 469 U.S. at 428 n.9 (quoting *Reynolds v. United States*, 98 U.S. 145, 156–57 (1878))).

Applying these standards, the Washington Supreme Court concluded Judge Martinez properly exercised his discretion in removing Mr. Deal. Pet. App. 173a. The court noted that Brown did not object at trial to the State's challenge of Richard Deal for cause, and explained that "[Mr. Deal] indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." Pet. App. 173a. In the conclusion of the opinion, the Washington Supreme Court determined the trial judge properly excused Mr. Deal because his "views would have prevented or substantially impaired [his] ability to follow the

court's instructions and abide by [his] oath[] as [a] juror[]." Pet. App. 208a.

The Washington Supreme Court affirmed Brown's conviction and sentence, and subsequently denied his personal restraint petition. *In re the Pers. Restraint of Brown*, 143 Wash. 2d 431, 21 P.3d 687 (2001).[3]

5. The Federal Habeas Corpus Proceedings

Brown filed his current habeas corpus petition alleging, among other things, that the trial judge improperly removed Mr. Deal as a juror.

a. Standards For Granting Habeas Corpus Relief Under 28 U.S.C. § 2254

The Antiterrorism And Effective Death Penalty Act (AEDPA) limits the power of federal courts to grant habeas relief to state prisoners. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). In any review under AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

A federal court may not grant relief on a claim adjudicated on the merits in state court unless the applicant satisfies the conditions in § 2254(d)(1) or (2). Under 28 U.S.C. § 2254(d)(1), an applicant must prove that the state court decision was "contrary to, or involved an unreasonable

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[3] Brown's personal restraint petition did not challenge the decision to remove Mr. Deal as a juror.

application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." The "contrary to . . . clearly established Federal law" standard of 28 U.S.C. § 2254(d)(1) allows relief only if the "state court arrives at a conclusion opposite to that reached by this Court on a question of law," or "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams*, 529 U.S. at 405. "[T]he state court's decision must be substantially different from the relevant precedent of this Court." *Id.* The "unreasonable application of [] clearly established Federal law" standard of 28 U.S.C. § 2254(d)(1) allows relief only if the "'state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (quoting *Williams*, 529 U.S. at 413). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Even "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id.* To obtain relief, the decision must be objectively unreasonable. *Id.* at 75–76.

Under § 2254(d)(2), an applicant must establish that the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." That reasonable minds might disagree about the correct resolution of a factual issue is not sufficient. *Rice v.*

Collins, 126 S. Ct. 969, 976 (2006). The applicant must show the state court determination of the facts was not only erroneous, but objectively unreasonable. *Id.* at 974–76.

b. The District Court

In addressing the removal of Mr. Deal, the district court explained that the "determination as to individual juror bias in both trial and capital sentencing juries, are factual questions entitled to the presumption of correctness," and that a "petitioner must rebut such a finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1)." Pet. App. 73a–74a.

In reviewing the record, the district court stated that Mr. Deal "indicated that the death penalty was appropriate in severe situations, such as when a person is, would be incorrigible and would reviolate if released." Pet. App. 77a (citation omitted; internal quotation marks omitted). Elsewhere, Mr. Deal "indicated that he could consider the options of life without parole and death, and could vote for a death sentence if he was convinced that was the appropriate measure." Pet. 77a (internal quotation marks omitted). However, the district court pointed out that "Mr. Deal also indicated some confusion about the impact of a life sentence without parole and the standard of proof. Mr. Deal stated that he would only impose the death penalty if someone could kill again on parole . . . ." Pet. App. 77a.

The district court concluded that the state court decision to remove Mr. Deal was "not contrary to, or an unreasonable application of, clearly

established federal law as established by the Supreme Court." Pet. App. 78a. The district court held that both "the trial court in excusing the jurors, and the Washington Supreme Court is [sic] addressing Petitioner's claim of improper dismissal, applied [*Witt v.*] *Wainwright*'s standard." Pet. App. 78a–79a. And the court held that there was "sufficient evidence to establish that each juror's views would 'prevent or substantially impair' his or her ability to carry out the duties imposed on jurors," and that the state court decision "was not an unreasonable determination of the facts as presented in the state court proceeding." Pet. 79a.

c. The Ninth Circuit

Brown appealed to the Ninth Circuit, which granted relief as to his sentence, concluding the state trial court erred by removing Mr. Deal as a juror. The Ninth Circuit's decision rested on three main points. First, the Ninth Circuit held: "Nowhere did the court find that [Mr. Deal][4] would be unable to follow instructions." Pet. App. 13a. The Ninth Circuit found this to be significant because the Washington Supreme Court's decision "found that both [Ms. Henderson] and [Ms. Denis][5] were 'substantially impaired' in their ability to perform their duties as jurors [b]ut a similar finding is missing from the state court's discussion of

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[4] The Ninth Circuit decision referred to Mr. Deal as juror Z.

[5] The Ninth Circuit's decision referred to two other jurors who were dismissed from the jury, Ms. Henderson, as Juror Y, and Ms. Denis, as Juror X.

[Mr. Deal]." Pet. App. 13a (citation omitted). Because the Ninth Circuit held that there was no factual finding that Mr. Deal was substantially impaired, it failed to apply the presumption of correctness due factual determinations under 28 U.S.C. § 2254(e)(1).

Second, the Ninth Circuit held that the "Washington Supreme Court in this case *applied the wrong standard* with respect to [Mr. Deal]; it nowhere found that [Mr. Deal] could not follow his oath." Pet. App. 19a–20a n.10. Citing *Gray v. Mississippi*, 481 U.S. 648, 658–59 (1987), the Ninth Circuit stated that, at the time of Brown's trial, it was "clearly established that excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law." Pet. App. 13a. According to the Ninth Circuit, Judge Martinez granted the prosecutor's challenge to Mr. Deal, but "the prosecutor says nothing about the juror's oath or whether [Mr. Deal] will follow it. Rather, the prosecutor concentrates . . . on the question of whether [Mr. Deal] would be willing to impose the death penalty if the alternative were life without parole." Pet. App. 20a n.10. The Ninth Circuit concluded that "there is nothing whatsoever in [Mr. Deal's] voir dire that lends the least support for the finding—explicit or implicit—that he would not follow his oath." Pet. App. 21a n.10.

Third, the Ninth Circuit concluded that any "finding that [Mr. Deal] was 'substantially impaired' in his ability to follow the law, [] would have been unreasonable," citing 28 U.S.C. § 2254(d)(2), (e)(1). Pet. App. 13a–14a. The court based this conclusion on the transcript where Mr. Deal "stated

unequivocally that he could consider the death penalty as an option if told to do so." Pet. App. 10a. In reaching this conclusion, the Ninth Circuit expressly refused to give any deference to Judge Martinez's ability to observe the demeanor of Mr. Deal. The court held "demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words." Pet. App. 17a n.8.

The state petitioned for rehearing en banc. The Ninth Circuit denied the petition, but Judge Tallman, joined by four other judges, dissented from the denial of rehearing en banc. According to the dissent, the "panel impermissibly substitutes its own evaluation of the trial judge's discretionary ruling" and "fails to give appropriate AEDPA deference to the determination of the Washington Supreme Court which approved the trial judge's reasonable and more informed approach . . . ." Pet. App. 23a, 24a.

The dissent disagreed with the panel's conclusion that the Washington Supreme Court did not find that Mr. Deal was substantially impaired. The dissent stated: "Whether or not the Washington Supreme Court intoned the magic words, 'substantially impaired,' it affirmed the trial court because of [Mr. Deal's] erroneous belief about when the death penalty should be applied under Washington law." Pet. App. 39a. As a result, the Washington Supreme Court "impliedly determined [Mr. Deal] would be substantially impaired in his duties as a juror to follow the law by holding that he was properly dismissed for cause." Pet. App. 40a. And the dissent stated the court "must afford the same presumption of correctness to the Washington

Supreme Court in reviewing the trial court's factual determination of juror bias." Pet. App. 39a.

In reviewing the transcript, the dissent concluded that Mr. Deal was "confused[.]" Pet. App. 29a. "[Mr. Deal] wavered back and forth between claiming to understand what he was being told about when the Washington capital sentencing law applied, yet he reiterated his erroneous belief that death was applicable only for recidivists." Pet. App. 34a. "The transcript reflects that he seemed easily led by both the prosecution and defense counsel into declaring an understanding that everyone in the courtroom recognized he simply did not have." Pet. App. 34a. Noting that defense counsel did not object to Mr. Deal's removal (Pet. App. 32a), the dissent found "[q]uite clearly those who had the opportunity to watch [Mr. Deal's] testimony, including the trial judge, the prosecution, and defense counsel, both during and after questioning him on voir dire, felt that [Mr. Deal] was properly dismissed for cause." Pet. App. 33a.

SUMMARY OF THE ARGUMENT

Wainwright v. Witt, 469 U.S. 412 (1985), established federal law that allows a trial judge to excuse a juror for cause, if the juror's views on the death penalty would substantially impair the juror's ability to perform the duties of a juror. Whether a particular juror is substantially impaired is a question of fact, answered by the judge's observations of the juror during voir dire. In this case, the trial court applied the *Witt* standard and dismissed Richard Deal from Brown's jury. Applying the same standard, the Washington Supreme Court

affirmed the trial court, expressly holding that Mr. Deal was substantially impaired. The Ninth Circuit's decision reversing the Washington courts is in error.

In a habeas corpus action, 28 U.S.C. § 2254(e)(1) requires the federal courts to apply a presumption of correctness to state court findings of fact that may only be overcome by clear and convincing evidence. The Ninth Circuit refused to apply this presumption of correctness to the Washington courts' decisions because the circuit court believed there was no express finding that Mr. Deal could not follow his oath. The Ninth Circuit's decision is incorrect. The Washington Supreme Court expressly held that Mr. Deal was substantially impaired. Moreover, § 2254(e)(1) does not require the state courts to enter express findings of fact. The presumption applies if there is a transcript of the voir dire showing that the potential juror was questioned in the presence of counsel and the judge; at the end of the colloquy, the prosecution challenged the juror; and the challenge was sustained when the judge dismissed the juror. This is exactly how Mr. Deal was dismissed. The decisions of the Washington courts are entitled to the presumption of correctness, and Brown did not come forward with clear and convincing evidence to overcome the presumption.

Under 28 U.S.C. § 2254(d)(1), a federal court cannot grant a habeas corpus petition unless the applicant establishes that the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court. The substantial

impairment standard in *Witt* is clearly established law, which was applied by the Washington courts. The Ninth Circuit concluded that the state courts applied the wrong standard because they did not state that Mr. Deal would be unable to follow his oath. However, it was the Ninth Circuit—not the state courts—that applied the wrong standard. *Witt* clarified *Witherspoon v. Illinois*, 391 U.S. 510 (1968), holding that the proper standard was the substantial impairment standard and not whether a juror would automatically vote against imposing the death penalty. Brown has failed to establish that the state court decisions were contrary to, or involved an unreasonable application of, *Witt*.

Under 28 U.S.C. § 2254(d)(2), a federal court cannot grant a habeas corpus petition unless the petitioner establishes that the state court decision was based on an unreasonable determination of the facts. This is a substantial burden. The petitioner must establish that the state court decision was objectively unreasonable. The Ninth Circuit held that the state courts' decisions were unreasonable because Mr. Deal stated that he could consider and apply the death penalty. The circuit court refused to grant any deference to the trial judge's ability to observe the demeanor and evaluate the credibility of the potential juror during voir dire, because it stated that the transcript was clear. The Ninth Circuit's decision is incorrect. The test for impairment is not a catechism based on the answer to one question. Rather, it is based on the trial judge's views of the entire voir dire. Despite clear words in a transcript, a potential juror's demeanor may persuade a trial judge that the juror is impaired. There is no basis

for the Ninth Circuit's decision not to grant deference to the trial judge.

By failing to grant deference to the trial court judge, the Ninth Circuit substituted its judgment for that of the trial court. But under a proper application of § 2254(d)(2), the decision to dismiss Mr. Deal was not objectively unreasonable. Although Mr. Deal said he could impose the death penalty in an appropriate case, he repeatedly stated during voir dire that he believed the death penalty was appropriate if the defendant had killed and would be in a position to kill again. But this is not the standard Washington uses in imposing the death penalty. In light of these answers, it was reasonable for the trial court to conclude that Mr. Deal was substantially impaired.

ARGUMENT

1. The Ninth Circuit Erred In Failing To Apply The Presumption Of Correctness Under 28 U.S.C. § 2254(e)(1) To The Washington Courts' Determination That Mr. Deal Was Substantially Impaired

28 U.S.C. § 2254(e)(1) requires that, when federal courts consider a habeas corpus petition, "a determination of a factual issue made by a State court shall be presumed to be correct." This statutory presumption of correctness is now unconditional. Section 2254(e)(1) eliminated the exceptions to the presumption of correctness listed in former 28 U.S.C. § 2254(d), including the exception that allowed the federal court to disregard a state court finding of fact if the finding was not supported

by the record. 28 U.S.C. § 2254(e)(1). This "presumption of correctness is equally applicable when a state appellate court, as opposed to a state trial court, makes the finding of fact . . . ." *Sumner v. Mata*, 455 U.S. 591, 592–93 (1982). The question of juror impartiality is necessarily one of fact, and this Court has held that a finding that a juror is substantially impaired because of his or her views regarding the death penalty "is a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254." *Darden v. Wainwright*, 477 U.S. 168, 175 (1986); *Witt*, 469 U.S. at 429 (the statutory presumption of correctness "applies equally well to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause").

The Ninth Circuit circumvented the mandatory requirements of § 2254(e)(1) by concluding the state courts made no finding that Mr. Deal was substantially impaired. Pet. App. 13a, 20a n.10. The Ninth Circuit's decision is in error for two reasons. First, the Washington Supreme Court did expressly find Mr. Deal's views on the death penalty "would have prevented or substantially impaired [his] ability to follow the court's instructions and abide by [his] oath[] as [a] juror[]." Pet. App. 208a. Second, the trial judge necessarily, albeit implicitly, determined Mr. Deal was substantially impaired when the judge excused Mr. Deal from the jury. The presumption of correctness required by § 2254(e)(1) is not limited to express findings of the trial court. The presumption applies to the express and implicit findings of the state trial and appellate courts. The fact that the court grants or denies the relief sought constitutes a

determination of fact that is subject to the statutory presumption of correctness.

The Court explained this principle in *Marshall v. Lonberger*, 459 U.S. 422 (1983), in which the Court discussed *Lavallee v. Delle Rose*, 410 U.S. 690 (1973). In *Lavallee*, "the trial judge likewise failed to make express findings as to the defendant's credibility." *Marshall*, 459 U.S. at 433. "[*Lavallee*] held that because it was clear under the applicable federal law that the trial court would have granted the relief sought by the defendant had it believed the defendant's testimony, its failure to grant relief was tantamount to an express finding against the credibility of the defendant." *Marshall*, 459 U.S. at 433.

Likewise, in *Witt*, this Court rejected the claim that the statutory presumption of correctness applies only to express findings. In *Witt*, the trial court did not make an express finding that a juror was substantially impaired. The defendant argued the presumption of correctness did not apply because "this conclusion was not evidenced by a written finding, written opinion, or other reliable and adequate written indicia." *Witt*, 469 U.S. at 430 (internal quotation marks omitted). This Court disagreed, holding that the presumption of correctness applied if there was a "transcript of the voir dire [showing that the juror] was questioned in the presence of both counsel and the judge; at the end of the colloquy the prosecution challenged for cause; and the challenge was sustained when the judge asked [the juror] to step down." *Witt*, 469 U.S. at 430 (internal quotation marks omitted). The same was true in *Darden*. Despite the lack of an express

finding that the juror was impaired, the Court held that the "trial judge's determination that a potential juror is impermissibly biased is a factual finding entitled to a presumption of correctness . . . ." *Darden*, 477 U.S. at 175. And, as in *Witt*, the Court looked to the transcript of the voir dire proceedings to make its analysis. *Id.* at 176–78.

The state courts necessarily determined the factual issue of Mr. Deal's substantial impairment when the trial judge removed him as a juror, and the Washington Supreme Court affirmed his removal on direct appeal. The state courts expressly applied the substantial impairment standard in reviewing the prosecution's challenge to Mr. Deal. Pet. App. 160a–173a; J.A. 7–9. Applying this standard, the state courts decided Mr. Deal should be excused. This decision was tantamount to a determination that Mr. Deal was substantially impaired.

It is also significant that Brown's defense counsel did not object when the prosecutor challenged Mr. Deal. When defense counsel did object to the prosecutor's challenge, Judge Martinez made an express finding of substantial impairment on the record. *See, e.g.*, J.A. 54–56, 97–100, 117–18. However, there was no need to make such an express finding in absence of an objection. As the Court explained in *Witt*, "[n]or do we think under the circumstances that the judge was required to announce for the record his conclusion that [the juror] was biased, or his reasoning. The finding is evident from the record." *Witt*, 469 U.S. at 430. This Court found it "noteworthy that [the trial court] was given no reason to think that elaboration was necessary; defense counsel did not see fit to object to

[the juror's] recusal, or to attempt rehabilitation." *Witt*, 469 U.S. at 430–31.

The statutory presumption of correctness applies unless the petitioner rebuts it "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Brown presented no clear and convincing evidence to rebut the state courts' finding that Mr. Deal was substantially impaired. Selected voir dire answers by Mr. Deal, considered out of context and without benefit of observing his demeanor, fall far short of clear and convincing evidence. Brown has offered nothing more.

2. In Light Of The State Court Finding, The Decision To Remove Mr. Deal Was Not Contrary To Or An Unreasonable Application Of Clearly Established Federal Law

28 U.S.C. § 2254(d)(1) authorizes the federal courts to grant a habeas corpus petition only if the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ."

a. *Witt* Clearly Established As Federal Law That A Judge May Remove A Juror Who Is Substantially Impaired

This Court's holding in *Witt* clearly established the federal law at issue in this case. *Witt* held that a judge properly dismisses a prospective juror where "the juror's views would

'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Witt*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The Court has repeated this standard in subsequent decisions. *Darden*, 477 U.S. at 175; *Morgan v. Illinois*, 504 U.S. 719, 728 (1992).

Witt clarified the limited holding in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Witt* explained that *Witherspoon* "focused only on circumstances under which prospective jurors could *not* be excluded; under *Witherspoon's* facts it was unnecessary to decide when they *could* be excluded." *Witt*, 469 U.S. at 422. Some lower courts had read the dicta in *Witherspoon* to permit a judge to disqualify a potential juror in a capital case "only if he or she would automatically vote against the death penalty, and even then this state of mind must be unambiguous, or unmistakably clear." *Id.* at 419 (internal quotation marks omitted). *Witt* "dispens[ed] with *Witherspoon*'s reference to 'automatic' decisionmaking" and "reaffirm[ed] the [substantial impairment standard] from *Adams* as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment." *Id.* at 424.

Even though a juror's views may not make the juror "automatically vote against the death penalty," those views may still prevent or substantially impair the juror from being impartial and following the law. "[W]hether or not a venireman *might* vote for death under certain *personal* standards, the State still may properly challenge that venireman if he refuses to

follow the statutory scheme and truthfully answer the questions put by the trial judge." *Witt*, 469 U.S. at 422. The court may exclude jurors who "might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Id.* at 423.

Witt also held that the standard for juror disqualification in a capital case "does not require that a juror's bias be proved with unmistakable clarity." *Witt*, 469 U.S. at 424 (internal quotation marks omitted). The Court reasoned that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made unmistakably clear . . . ." *Id.* at 424–25 (internal quotation marks omitted). Instead of unmistakable clarity, *Witt* held that a potential juror may properly be dismissed where "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 426.

b. The State Court Decision That Mr. Deal Was Substantially Impaired Was Not Contrary To Or An Unreasonable Application Of *Witt*

The decisions of the Washington courts to dismiss Mr. Deal from the jury were not contrary to or an unreasonable application of clearly established federal law, because the state courts applied the standard in *Witt* and found that Mr. Deal was

substantially impaired. Thus, Brown cannot obtain habeas corpus relief under 28 U.S.C. § 2254(d)(1).

The Ninth Circuit concluded that "excusing [Mr. Deal] for cause was directly contrary to Supreme Court precedent . . . ." Pet. App. 19a. Relying on *Gray v. Mississippi*, 481 U.S. 648, 658–59 (1987), the court stated that it was "clearly established that excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law." Pet. App. 13a. The Ninth Circuit determined the state court "*applied the wrong standard*" because the state court "nowhere found that [Mr. Deal] could not follow his oath." Pet. App. 19a–20a n.10.

The Ninth Circuit's analysis is flawed for four reasons. First, the Washington Supreme Court did find Mr. Deal was substantially impaired in following his oath as a juror. Pet. App. 208a.

Second, the state courts stated that they were applying the correct standard. Judge Martinez expressly stated he was applying the "substantial impairment" standard established in *Witt* for reviewing the challenges for cause. J.A. 7–9; *see also* J.A. 56, 99–100, 117–18 (judge finding jurors to be substantially impaired). The Washington Supreme Court also expressly stated it was reviewing the challenges for cause under the *Witt* substantial impairment standard. Pet. App. 160a–73a, 208a. There is no evidence the state courts applied the wrong standard in this case.

Third, it is the Ninth Circuit—not the state courts—that applied the wrong standard. According to the Ninth Circuit, a juror may not be disqualified

unless the juror states that he or she "would not follow the law." Pet. App. 13a. The Ninth Circuit essentially reverted to the dicta in *Witherspoon*, which led some lower courts to incorrectly conclude that a juror could be disqualified only if he or she would automatically vote against the death penalty. *Witt* expressly "dispens[ed] with *Witherspoon*'s reference to 'automatic' decisionmaking . . . ." *Witt*, 469 U.S. at 424. Thus, the standard is not whether Mr. Deal said he could follow his oath. The standard is whether Mr. Deal's "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* (internal quotation marks omitted).

Fourth, the Ninth Circuit's reliance on *Gray* is misplaced. *Gray* did not alter the law clearly established by *Witt*. The phrase "clearly established Federal law" in § 2254(d)(1) means the holdings of this Court. *Carey v. Musladin*, 127 S. Ct. 649, 653 (2006). *Gray* explained that *Witt* "clarified the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment [holding] that the relevant inquiry is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Gray*, 481 U.S. at 658 (internal quotation marks omitted). And *Gray* stated that there is "no need to delve again into the intricacies of that standard." *Id.* The sole issue before the Court in *Gray* was whether the erroneous removal of the juror was subject to a harmless error analysis. *Id.* at 657.

Moreover, the decisions of the state courts are not contrary to *Gray*. Under the "contrary to . . . clearly established Federal law" standard of § 2254(d)(1), a petitioner is entitled to relief only if the "state court arrives at a conclusion opposite to that reached by this Court on a question of law," or "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams*, 529 U.S. at 405. Here, the state courts did not arrive at a conclusion opposite to that reached by this Court on a question of law, and the state court decision did not involve facts materially indistinguishable from those in *Gray*. Unlike this case, *Gray* did not involve a state court finding that the removed juror was substantially impaired. *Gray*, 481 U.S. at 653–55. On the contrary, Gray objected to the removal of the juror, and the Mississippi state court explicitly found the juror was not impaired and could impose the death penalty. *Id.* Thus, the facts in the present case were not "materially indistinguishable" from those in *Gray*.

The Ninth Circuit failed to give the state court decisions the deference required by AEDPA. AEDPA "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Brown has not shown that the state court decision was erroneous. The Ninth Circuit's conclusion that the state courts not only erred, but reached a decision contrary to Supreme Court precedent, gave too little deference to the state court adjudication of this claim. *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003).

3. The State Courts' Decision Was Not Based Upon An Unreasonable Determination Of The Facts In Light Of The Evidence Presented In State Court

After incorrectly ruling that the Washington courts did not find that Mr. Deal was substantially impaired, the Ninth Circuit went on to state that any "finding that [Mr. Deal] was substantially impaired in his ability to follow the law . . . would have been unreasonable," citing 28 U.S.C. § 2254(d)(2). Pet. App. 13a–14a (internal quotation marks omitted). To obtain relief under 28 U.S.C. § 2254(d)(2), a petitioner must establish that the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Under this latter standard, it is not enough to demonstrate that reasonable minds might disagree about the correct resolution of a factual issue. *Rice v. Collins*, 126 S. Ct. 969, 976 (2006). The applicant must show the state court determination of the facts was not only erroneous, but objectively unreasonable. *Id.* at 974–76. To be an unreasonable determination of the facts, the evidence must be "too powerful to conclude anything but" the contrary of that reached by the state court. *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005).

The Ninth Circuit did not discuss or apply the heightened standard required by § 2254(d)(2) in the decision below. Instead, the circuit court substituted its judgment for that of the state courts. The Ninth Circuit concluded that Mr. Deal was not impaired, because he "stated unequivocally that he could consider the death penalty as an option if told to do

so." Pet. App. 10a. This statement by Mr. Deal is not determinative of whether he was substantially impaired. In *Witt*, this Court stated that the "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Witt*, 469 U.S. at 424. In fact, "[r]elevant *voir dire* questions addressed to this issue need not be framed exclusively in the language of the controlling appellate opinion . . . ." *Id.* at 433–34. Yet the decision below reduces juror disqualification to a catechism. If a potential juror states he or she can consider the death penalty, the Ninth Circuit concludes that the juror cannot be impaired—regardless of what else the juror says during voir dire. Rather than a catechism, this Court recognized "common sense" tells us and "experience has proved" that "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425–26.

Moreover, the Ninth Circuit was able to reach the conclusion that any state court's finding of substantial impairment would be unreasonable only because the circuit court refused to grant any deference to the trial judge's ability to evaluate the demeanor and credibility of potential jurors during voir dire. The Ninth Circuit stated that "demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words" (Pet. App. 17a n.8), and the court concluded Mr. Deal's "clear words were that he could impose the death penalty and would follow the court's instructions; he never said anything to the contrary." Pet. App. 17a n.8.

There is no basis for the Ninth Circuit's refusal to grant deference to the trial court's ability to observe and consider juror demeanor. Indeed, it conflicts with the whole concept of voir dire. In order to "detect prejudices . . . the court [] must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality." *Gomez v. United States*, 490 U.S. 858, 874–75 (1989). For this reason, "[d]emeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying." *Patton v. Yount*, 467 U.S. 1025, 1038 n.14 (1984). Indeed, potential jurors "may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings." *Witt*, 469 U.S. at 425; *Smith v. Phillips*, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring) ("Determining whether a juror is biased . . . is difficult, partly because the juror may have an interest in concealing his own bias . . . ."). For this reason, the "manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." *Witt*, 469 U.S. at 428 n.9 (quoting *Reynolds v. United States*, 98 U.S. 145, 156–57 (1879)).

The trial judge has the singular opportunity to assess each juror's demeanor, inflection, and credibility during the voir dire process, placing that judge in a position far superior to the reviewing courts to determine the "real character" of the

prospective juror's impartiality. *Patton*, 467 U.S. at 1037–38, nn.12 & 14. "The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." *Id.* at 1039. "It is here that the federal court's deference must operate, for while the cold record arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty." *Id.* at 1040.[6]

Regardless of voice, facial expressions, body language, or other non-verbal clues, the Ninth Circuit would accept the transcribed words over the observations of the trial judge. Even if a juror had made a statement with clear sarcasm, rolled his eyes, or even shook his head "no" when saying the word "yes," the Ninth Circuit would accept the cold record and disregard the trial judge's observations. But the fact is that "no transcript can recapture the atmosphere of the *voir dire* . . . ." *Gomez*, 490 U.S. at 875.

Even if the Ninth Circuit is correct that Mr. Deal's "clear words" do not alone show bias, this conclusion is not sufficient to establish the state courts' determination of bias was– objectively unreasonable, the standard required by § 2254(d)(2). Unlike the federal court reviewing the transcript, the

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[6] This Court has repeatedly recognized that the trial judge is in a better position than an appellate court to judge demeanor and credibility. *Rice*, 126 S. Ct. at 974–76; *id.* at 977 (Breyer, J., concurring); *Witt*, 469 U.S. at 426; *Rushen v. Spain*, 464 U.S. 114, 120 (1983); *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

trial judge was aided by his assessment of Mr. Deal's demeanor. *Darden*, 477 U.S. at 178. The habeas statute "gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall*, 459 U.S. at 434 (citing *United States v. Oregon Med. Soc'y*, 343 U.S. 326, 339–40 (1952)). "In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . ." *Id.* (alterations in original).

The Washington courts' finding that Mr. Deal was substantially impaired is not objectively unreasonable. During the voir dire, when asked if he could consider the death penalty, Mr. Deal said: "I could consider it, yes." J.A. 73. When asked if he could impose it, Mr. Deal said: "I could if I was convinced that was the appropriate measure." J.A. 73. This was the end of the inquiry for the Ninth Circuit. However, when asked when the death penalty would be appropriate, Mr. Deal stated that it would have to be a severe situation where the defendant could kill again. In his questionnaire, Mr. Deal stated that he was "in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again." J.A. 69. When asked by Brown's defense counsel why the death penalty was appropriate, Mr. Deal testified:

> "I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." J.A. 62.

When the prosecutor asked whether Mr. Deal would "still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us" (J.A. 69–70), Mr. Deal responded:

> "A I would have to know the, I'm at a loss for the words here.
>
> "Q You can ask me any questions, too, if you need some clarification.
>
> "A I guess it would have to be in my mind very obvious that the person would reoffend." J.A. 70.

When asked by the prosecutor whether he would be willing to vote for the death penalty in light of the fact that the alternative sentence would be life without the possibility of parole (J.A. 71–72), Mr. Deal said:

> "I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole." J.A. 72.

In light of these answers and the trial court's ability to evaluate Mr. Deal's demeanor and credibility, it was not unreasonable for Judge Martinez to find that Mr. Deal was substantially impaired. In Washington, the prosecutor need not prove the defendant will get out and kill again. Proof of such a fact is nearly impossible, since the only alternative sentence to death is life without possibility of parole. Wash. Rev. Code § 10.95.030

(J.A. 166–67). Instead of considering whether the defendant may kill again, the jury considers only this statutory question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" Wash. Rev. Code 10.95.060(4) (J.A. 169). Because Brown would never be released under Washington law, and Mr. Deal believed the death penalty was appropriate only where the defendant would be released and kill again, it was objectively reasonable to conclude that Mr. Deal was substantially impaired in his ability to vote for the death penalty in this case. Brown has not met his burden to demonstrate that such a finding was unreasonable, as § 2254(d)(2) demands, and the Ninth Circuit erred in concluding otherwise.

It is also significant that Brown's counsel did not object to the prosecutor's challenge of Mr. Deal and, in fact, affirmatively stated that Brown had no objection to Mr. Deal's removal from the jury. In *Witt*, this Court explained that "counsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering when assessing respondent's claims." *Witt*, 469 U.S. at 431 n.11. Had Brown objected, it is likely that the trial judge would have put his reasons for finding Mr. Deal substantially impaired on the record. For example, Brown objected to the dismissal of Ms. Henderson. J.A. 55–56. In rejecting Brown's

challenge to her dismissal, the Ninth Circuit relied upon her demeanor as stated by the trial judge. J.A. 117–18. When asked if she could consider the death penalty, the circuit court stated that Ms. Henderson "crossed her arms, held her hand up . . . and sat back." Pet. App. 9a & n.4 (alteration in original). Because Brown did not object to the prosecutor's challenge to Mr. Deal, and in fact affirmatively stated that Brown had no objection, there was little reason for the trial judge to make any similar observations on the record with respect to Mr. Deal. As the Court observed in *Witt*, a decision to remove a juror is reasonable where "no one in the courtroom questioned the fact that her beliefs prevented her from sitting." *Witt*, 469 U.S. at 435.

In this respect, it is also worth noting that Brown does not claim that counsel provided ineffective assistance in failing to object to Mr. Deal's removal from the jury. Counsel is presumed to have provided reasonably competent representation. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The courts therefore must presume that, if counsel believed Mr. Deal was not substantially impaired, counsel would have objected to the prosecution's challenge for cause. Because counsel did not object, and Brown has not alleged ineffective assistance of counsel as to the jury selection, the lack of an objection is compelling evidence that the trial judge acted properly by removing Mr. Deal as a juror. A criminal defendant cannot simply forego raising the issue at trial and then ask the federal courts on collateral review to second guess the judgment of the trial court.

CONCLUSION

For the reasons stated herein, the Court should reverse the decision of the Ninth Circuit and remand for further proceedings.

RESPECTFULLY SUBMITTED.

Robert M. McKenna
Attorney General

William Berggren Collins
Jay D. Geck
Deputy Solicitors General

Paul D. Weisser
Senior Counsel

John J. Samson*
Assistant Attorney General
**Counsel of Record*

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PO Box 40116
Olympia, WA 98504-0116
360-586-1445

Counsel For Petitioners